No. 81-2159

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of the appeal.

2. Whether an award of punitive damages with respect to a claim based on radiation hazards resulting from the operation of a federally licensed and regulated plutonium plant is pre-empted by the Atomic Energy Act.

3. Even if not so preempted, can such an award stand when its personal injury predicate is barred by the exclusive Oklahoma workers' compensation remedy.

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Enforcement Actions: Significant Actions Resolved, U. S. Nuclear Regulatory Commission, NUREG-0940, Vol. 1, Nos. 1-4 (1982)..... 22

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BRIEF FOR APPELLEES

JURISDICTION

The appellees urge that the Court is without jurisdiction to hear this appeal. In its order of January 10, 1983, the Court postponed consideration of that question until the hearing of the case on the merits. Accordingly, the appellees' discussion of the jurisdiction issue is set forth in Section I of the Argument, *infra.*

STATEMENT

The one-sided nature of appellant's Statement of the Case requires some restatement of the facts.[1] Moreover, since the appellant has chosen to argue a number of matters irrelevant to the questions presented, the appellees are compelled to set forth more facts than are strictly necessary to decide the narrow issues presented.

A. The Facts

Karen Silkwood was a laboratory analyst employed by Kerr-McGee at a federally licensed and regulated plutonium fuel fabrication facility located in Oklahoma.[2] She was exposed to plutonium at the plant on November 5th and 6th, 1974, and on November 7th in her apartment in a job-related incident at which time some of her personal property was also contaminated. Silkwood told both an AEC investigator and the head of Kerr-McGee's health physics department that the exposure at her apartment occurred when she spilled a urine sample that she was collecting at the direction of her employer (II J.A. 740, IV J.A. 1298-99, 1377-78). The appellant has conceded throughout that there is no proof as to how the plutonium got from Kerr-McGee's plant to Silkwood's apart-

[1] Record citations herein are as follows: "J.S.App." refers to the Appendix accompanying Appellant's Jurisdictional Statement; "J.A." refers to the five volume Joint Appendix in the Tenth Circuit and is cited by "(Volume) J.A. (page)"; "Tr." refers to the transcript of proceedings in the trial court. A listing of the corporate affiliations of Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation is contained at p. 22 of the Motion to Dismiss or Affirm.

[2] The license to receive and process special nuclear materials was granted to Kerr-McGee on April 2, 1970 by the Atomic Energy Commission ("AEC") pursuant to the Atomic Energy Act of 1954 and 10 C.F.R. Parts 40 and 70. The operations of the plant were thereafter subject to pervasive AEC regulation (Def. Exh. 1, R. Vol. 15, Tr. 7864; Def. Exh. 2, R. Vol. 16, Tr. 7867; Tr. 7840-7872).

ment or how she became exposed.[3] It was also admitted at trial that certain of the urine samples which Silkwood turned in for analysis were "spiked" or "salted" with plutonium that was not excreted in her urine (Tr. 543, II J.A. 784).

Kerr-McGee followed proper health physics procedures and immediately decontaminated Silkwood after each exposure. In addition, Kerr-McGee promptly made available to Silkwood medical care and treatment, which was given as soon as she would consent to receive it.[4] Kerr-McGee made special arrangements to send her to the medical facility at Los Alamos Scientific Laboratories at Los Alamos, New Mexico for testing and evaluation by specialists in radiation injury (Tr. 7043-7044).

The AEC conducted a prompt and thorough investigation of Silkwood's exposure.[5] The Commission's report concluded

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[3] In his opening statement, counsel for Silkwood told the jury: "Well, I don't know how Karen Silkwood got contaminated, and if I were to stand here and speculate with you I would be guilty of the same misconduct that you will soon hear from the defense" (III J.A. 902). *See also* Tr. 3443.

[4] On November 7th, Silkwood would not consent to examination by Kerr-McGee's specially trained plant physician (Tr. 4720-4722; 4766-4767; 7035). On November 8th, on the advice of a union colleague who flew to Oklahoma City from Washington, D.C., she isolated herself from Kerr-McGee. On November 9th, she did consent to examination by Kerr-McGee's medical consultant, and on November 10th was flown to Los Alamos (Tr. 7043-7064; Pl. Exh. 188, II J.A. 430-432, Tr. 3799). The appellant refers to "an unauthorized and dangerous drug" offered to Silkwood in the course of treatment (Appellant's Br. 13, n.22). The appellant's reference is to DPTA, a chelating agent which could remove plutonium from the body, which had been recommended by Kerr-McGee's medical consultant (II J.A. 430). The source of supply of the drug was the AEC, which along with the International Commission on Radiation Protection sanctioned its use (Tr. 5800-5801, 7080-7089).

[5] The investigation report, which contains a detailed chronology of events relating to Silkwood's contamination, is Def. Exh. 37 (II J.A. 729-790, Tr. 6154). The report shows that the amount of plutonium involved in the incident was estimated to have been less than 0.0003 grams (II J.A. at 734).

that Silkwood's exposure to plutonium was less than 25% of the permissible occupational body burden recognized by the authoritative national and international commissions and by the AEC (IV J.A. 1586-1589; II J.A. 809-813).[6] The testimony of the two medical experts in the field of radiation medicine who examined and tested Silkwood was that she had no cognizable physical injury; that her exposure to plutonium was not significant enough to cause a medically detectable injury; that based on reasonable medical certainty, she would have no adverse health effects from her exposure; and that long term studies of persons having greater exposure than she had demonstrated that there had been no significant health impact (Voelz, Tr. 9091-9202; Sternhagen, Tr. 7077-7080; IV J.A. 1431-1440; IV J.A. 1559-1605).[7]

After the job-related plutonium exposure in the apartment on the morning of November 7th, decontamination became

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[6] Silkwood's body burden of plutonium was 8.8 nanocuries. The permissible body burden for occupational exposure was 40 nanocuries. Her lung burden was 5 nanocuries; the permissible lung burden was 16 nanocuries (Tr. 7078; Def. Exh. 37 at II J.A. 752, 783). The permissible body burden is the exposure level at which there is a negligible probability of injury and at which effects likely to occur are of such a minor nature as not to be considered unacceptable by the exposed individual or by competent medical authorities (II J.A. 544). Lower courts have recognized that the recommendations of the International Committee on Radiation Protection (ICRP) and of the National Council for Radiation Protection (NCRP) are set to provide a safe margin between industrial practice and the level which would produce harmful effects. Mahoney v. United States, 220 F. Supp. 823, 838 (E.D. Tenn. 1963), *aff'd*, 339 F.2d 605 (6th Cir. 1964); Crowther v. Seaborg, 312 F. Supp. 1205, 1230-35 (D. Colo. 1970).

[7] The trial testimony on which the appellant relies to support a determination of personal injury is that of Dr. John W. Gofman. Gofman challenged the recognized national and international commissions charged with the duty of recommending acceptable levels of radiation exposure for employees at nuclear facilities. His views are known to these commissions as well as to the AEC, but each continues to adhere to existing standards (III J.A. 962-969).

necessary and was required by the AEC (II J.A. 748-749; 757-762). It was necessary to remove items of Silkwood's furniture, as well as a quantity of smaller articles. The parties stipulated that the items removed had a total value of $5,000.

All aspects of plant safety and operations which the appellant discusses (Appellant's Br. 12-14) were subject to extensive regulation by the AEC. The AEC's report of investigation of Silkwood's exposure includes an analysis of Kerr-McGee's physical security program (II J.A. 742) and Kerr-McGee's health physics records (II J.A. 745-746). The AEC concluded that Kerr-McGee's only violation of regulations throughout the entire Silkwood incident was a failure to maintain a record of the dates of two urine samples submitted by Silkwood (II J.A. 734). This violation, which occurred because Silkwood failed to supply Kerr-McGee with the dates, was not causally related in any way to her exposure or the exposure to her personal property. In all material matters, Kerr-McGee was in compliance with federal regulations as they pertained to the Silkwood incident.

The design of Kerr-McGee's plant, the equipment, and the processes utilized in the plant were "state of the art" and were approved by the AEC (Tr. 5497). James Keppler, Regional Director of the AEC with jurisdiction over the Kerr-McGee plant, testified that there were no serious personnel exposures at the plant; that Kerr-McGee did not exceed the regulatory requirements with respect to exposure levels that would result in significant health hazards; that the AEC viewed the plant as a "safe operation"; and that he never at any time considered the plant to be a hazard either to the workers or the public.[8]

[8] On September 27, 1974, Silkwood and two other local OCAW union committee members made allegations to the AEC concerning working conditions at the plant. Thirty-nine separate incidents or situations referred to by the OCAW were investigated (Def. Exh. 38, II J.A. 791-808, Tr. 4251-4252). Three violations of the lowest order of severity (Category III) were noted (II J.A. 793-794). None relates to Silkwood's exposures or to contamination of the apartment.

Although the AEC had the power to close the plant, that was never considered, and operation of the plant never resulted in a fine by the AEC or even a recommendation that a fine be levied (Tr. 8157-58; 8254-58).[9]

Among the numerous misleading statements about plant operations, the appellant implies that there was missing plutonium (Appellant's Br. 14). During operation of the plant, problems which were common in the industry were encountered relating to the complex task of measurement of the inventory of plutonium. When improved measurement techniques were developed, Kerr-McGee's accounting for plutonium was found to be in substantial compliance with the regulations,[10] as the undisputed testimony shows (see Tr. 7890-7919; 8531-8545). Kerr-McGee's compliance was independently verified at the direction of the Nuclear Regulatory Commission ("NRC") (successor to the AEC) by two independent laboratories engaged by the Department of Energy (Pl. Exh. 83, R. Vol. 13, Tr. 8038; Tr. 7909-10; 8542-48).

The appellant's assertions about documents never located after Silkwood's auto accident, allegedly defective fuel rod

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[9] Appellant relies almost exclusively on the testimony of Karl Z. Morgan as authority for criticism of plant operations (Appellant's Br. 12-14). Morgan had never been to the plant and had never interviewed any of the health physics personnel or even anyone who had ever worked at the plant. He was critical of the AEC and other regulatory agencies and expressed the opinion that the current radiation exposure levels accepted by the AEC for occupational workers were too high by a magnitude of 480 (Tr. 1637-1720; 1749-1760).

[10] The AEC requirement as to inventory is to account within a tolerance of one-half of one percent of plutonium received, or not less than 99.5 percent. Kerr-McGee accounted for 99.478 percent (Tr. 7905-7909).

welds,[11] and claims of safety violations (Appellant's Br. 11, n. 18) are likewise without foundation. The appellant is his own authority for these declarations, citing Addendum B to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc (J.S.App. 132a-136a) consisting of twenty-seven separately numbered and largely unsupported claims of the appellant, substantially all of which are in dispute.

B. The Tenth Circuit Opinion

The Tenth Circuit held that: (a) the claim for personal injuries to Karen Silkwood was subject to the Oklahoma Workers' Compensation Act, which constituted the exclusive remedy, as the evidence supported only the conclusion that her exposures to plutonium were all job-related (J.S.App. 13a-18a); (b) the $5,000 property damage award should be affirmed upon the application of Oklahoma law of strict

[11] As to the suggestion that Kerr-McGee was manufacturing defective fuel rod welds, these matters were thoroughly investigated by the AEC and the Energy Research and Development Administration ("ERDA"). It was concluded that Kerr-McGee's fuel pins met all established contract requirements and that the quality assurance program also met those requirements. See AEC Report of Investigation (Def. Exh. 98, R. Vol. 19, Tr. 6721, 9731), and ERDA Reports of Investigation (Def. Exh. 99, R. Vol. 19, Tr. 6723, 6729; Def. Exh. 100, R. Vol. 19, Tr. 6754, 9731). The confusion on this issue results from the actions of one laboratory analyst who "touched up" anomalies of negatives of certain photomicrographs of certain test welds with a felt tip pen, in order that the negatives would print a clear photo. However, contrary to the appellant's misstatement, none of the markings was used to obscure weld defects (Tr. 6748). These actions were without the knowledge of supervisory personnel and in any event did not involve or affect the manufactured pins or the quality assurance program (Tr. 6665-6764). The signed statement of the laboratory analyst was obtained by the AEC and appears as Exhibit G to Defendant's Exhibit 98, in which it is stated that the anomalies on the negatives were the result of defects in the film emulsion and were not indicative of flaws in the test welds.

liability, plutonium having escaped from the Kerr-McGee plant and being a toxic and dangerous substance, and the property damage caused by plutonium contamination being foreseeable (J.S.App. 18a-21a); and (c) no punitive damages may be awarded in this case by reason of federal preemption (J.S.App. 21a-24a).[12]

The Tenth Circuit reversed the punitive damage verdict because exclusive regulatory authority over radiation hazards is granted to the AEC by the Atomic Energy Act of 1954. The court held that a judicial award of punitive damages under state law to punish or deter alleged unsatisfactory practices involving exposure to radiation has a regulatory effect and is no less intrusive than direct legislative regulation of radiation hazards by a state and is, therefore, preempted by federal law. In view of its decision on federal preemption, the Tenth Circuit considered none of Kerr-McGee's other arguments as to the impropriety of punitive damages in this case (J.S.App. 21a).

C. Present Posture of the Case

It is important to note the posture in which the decision of the Tenth Circuit leaves this case. Since the court held that the Oklahoma Workers' Compensation Law bars Silkwood's personal injury award (a holding which is not under review here), that award no longer provides a predicate or basis for the $10,000,000 punitive damage award. The only compensatory verdict remaining in this case is the property damage award of $5,000—the stipulated value of Silkwood's furnishings—from which Kerr-McGee has not appealed. The Tenth Circuit's holding that the punitive damage award was preempted under the Atomic Energy Act is therefore the only holding that has been appealed. Thus, the preemption issue before this Court can relate only to the punitive damage award insofar as it is

[12] The Opinion was by a divided court. But even the dissenting Judge would have reversed the trial court on the workers' compensation issue for not submitting the issue to the jury (J.S.App. 29a-30a).

predicated upon the property damage award. If preempted, the punitive award must fail. If there is not a proper predicate, it must likewise fail. Only if both of these propositions are rejected would the case be properly remanded for consideration of the other issues not yet considered by the Tenth Circuit.

SUMMARY OF ARGUMENT

This case is not properly before the Court on appeal under 28 U.S.C. § 1254(2) because the court of appeals did not hold the Oklahoma punitive damage statute invalid. The case should therefore be dismissed (pp. 12-16, *infra*). If not dismissed, the arguments which follow require affirmance of the court of appeals' decision.

This Court's decision in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, ____ U. S. ____, 103 S.Ct. 1713 (1983) firmly establishes that the federal government has occupied the field of regulating radiation safety in connection with the operation of nuclear facilities and the handling of nuclear materials. Thus, any state regulation of radiation hazards is preempted. The government has exercised its authority in this field by way of a comprehensive regulatory and licensing scheme, through which the Nuclear Regulatory Commission is able to monitor every aspect of the production of nuclear energy (pp. 17-23, *infra*).

The judicial award of punitive damages in this case is an attempt to regulate nuclear safety and falls squarely within the field occupied by the federal government (pp. 24-30, *infra*). The punitive damages were awarded in connection with Karen Silkwood's exposure to plutonium, a radioactive substance, at the Kerr-McGee plant and in a job-related incident at her apartment. The purpose of the award was to punish Kerr-McGee for maintaining allegedly unsafe plant conditions and for "permitting" the escape of plutonium. The punitive damages were intended to deter Kerr-McGee from continuing such alleged practices and to prescribe the manner in which Kerr-

McGee was to conduct operations in its plant. Regulation of a federal nuclear licensee's conduct by imposition of punitive damages is "no less intrusive than direct legislative acts of the state," as the court below held (J.S.App. 24a). Indeed, because of the arbitrary and uncontrollable nature of such awards, they can be a great deal more intrusive. Since the duties of punishing and deterring the conduct of nuclear operators relating to radiation hazards were never ceded to the states, this assertion of authority by a state is preempted. Silkwood's attempt to circumvent this conclusion by claiming that the award of punitive damages was for "purposes other than regulation of radiation hazards" is without merit since all the alleged conduct supposedly underlying the award concerned radiation safety at Kerr-McGee's federally licensed operation.

In addition, the imposition of punitive damages frustrates the objectives of Congress in several important ways (pp. 30-34, *infra*). The availability of huge punitive awards could impede the stated purpose of the Atomic Energy Act to promote the development of nuclear energy. Congress has also made clear that it does not want a system of dual regulation of radiation hazards—a problem which will necessarily occur if punitive damages are permitted here.

Silkwood's references to the legislative history of the Price-Anderson Act do not alter this conclusion (pp. 34-39, *infra*). Nothing in that Act or its legislative history authorizes the imposition of punitive damages for radiation accidents, and nothing therein grants to the states the authority to punish and deter the conduct of nuclear licensees. The Act creates a compensation system, and Congress' references to non-interference with state tort law must be read as referring to state tort law for purposes of compensation only.

The court below found it unnecessary to consider any ground other than preemption in reversing the award of punitive damages. However, another compelling ground supports the court's action (pp. 41-46, *infra*). When the court of

appeals vacated Silkwood's claim for personal injuries on the ground that it was covered by the workers' compensation act, there was no longer any basis for the punitive damage award. The award was clearly incident to the personal injury claim. Since the trial court had no jurisdiction over the personal injury claim, the punitive damages predicated on that claim cannot stand. This constitutes an independent ground for affirming the decision of the court of appeals without the necessity of determining the preemption issue.

ARGUMENT

I.

THIS CASE IS NOT PROPERLY BEFORE THIS COURT ON APPEAL

This case does not fall within the narrow class of cases that may be appealed under 28 U.S.C. § 1254(2), in which Congress authorized review on appeal in only one instance—when the court of appeals has held a state statute "to be invalid as repugnant to the Constitution, treaties, or laws of the United States." This Court has emphasized its "practice of strict construction of statutes authorizing appeals," *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970), and has closely scrutinized the decisions of the courts of appeals to determine whether a state statute has been held invalid on federal grounds.

The state statute asserted to provide the basis for jurisdiction is the Oklahoma punitive damages statute, Okla. Stat. Ann. tit. 23 § 9 (West 1955), which permits a jury to award exemplary damages where a defendant has been guilty of oppression, fraud or malice. However, the court of appeals did not hold this statute invalid, either on its face or as applied. The court was concerned only with interpreting the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and with determining whether an award of punitive damages fell within the federally-occupied field of radiation hazards. It held that because they competed with the NRC's regulation of radiation hazards, "punitive damages may not be awarded in this case" (J.S.App. 24a). The court never addressed, analyzed or ruled on the validity of the punitive damages statute itself. In fact, nowhere in the Tenth Circuit's opinion is the statute even mentioned.[13]

[13] The dissenting opinion in the decision below suggests that the award of punitive damages in this case rested on common law rather than state statute: "The question here is whether the Atomic Energy Act . . . impliedly preempts part of the Oklahoma common law remedy" (J.S.App. 32a).

Jurisdiction under § 1254(2) may not be invoked merely by challenging the validity of an action taken under a statute; the statute itself must be specifically challenged and held to be invalid, and not merely inapplicable. In *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, ____ U.S. ____, 103 S.Ct. 948 (1983), the court of appeals had held that certain provisions of a collective-bargaining agreement, but not the state statute authorizing such agreements, were constitutionally invalid. This Court denied the appeal under § 1254(2) stating that:

> No state statute or other legislative action has been invalidated by the Court of Appeals. The Court of Appeals has held only that certain sections of the collective bargaining agreement entered into by the school district and PEA are constitutionally invalid; the Indiana statute authorizing such agreements is left untouched.

103 S.Ct. at 953. Similarly here, the court of appeals left the Oklahoma statute untouched. Only the judicial award of punitive damages was held to be erroneous, because that type of regulation was preempted by the Atomic Energy Act. There was not, and is not, any attack on the Oklahoma statute properly before this Court.

Cases interpreting the analogous jurisdictional statute, 28 U.S.C. § 1257(2), also recognize the necessity of showing that the validity of the statute was drawn into question and actually decided by the court.[14] *Charleston Fed. Savs. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 187 (1945); *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978).[15]

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[14] In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675-77 n.11 (1974), this Court noted "the history of the close relationship between" § 1254(2) and § 1257. Decisions under § 1257(2) may be looked to for guidance in interpreting § 1254(2). 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4037, at 36 (1978).

[15] In *Kulko*, this Court said: "Appellant did not argue below that [the state] statute was unconstitutional, but instead argued that the

(Footnote continued on next page.)

In the present case it was the *assessment* of punitive damages that was challenged, not the *validity* of the statute. As this Court has noted, "[t]he mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U.S. 1, 6 (1920). For this reason, this Court has often held that an appeal will not be sustained where a tax assessment is challenged on constitutional grounds but not the validity of the tax statute.[16]

The formulation of the punitive damage issue and the explicit statement of the holding of the court below confirm that the Oklahoma statute was not held to be invalid. When the court of appeals first framed the issue of punitive damages, it did not cite or mention the Oklahoma statute, but spoke only of the punitive damage award: "Kerr-McGee makes several argu-

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(Footnote continued from preceding page.)

Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute." 436 U.S. at 90 n.4. Similarly here, no contention was made that the Oklahoma statute is unconstitutional or otherwise invalid but rather that the provisions of the Atomic Energy Act precluded the district court from granting punitive damages.

[16] Under 28 U.S.C. § 1257(2) it has long been settled that it is not sufficient to attack a tax assessment levied under a state statute as being unconstitutional or to show that the state court has passed upon the validity of the tax. The court must consider and sustain the validity of the tax statute itself in order to invoke this Court's appellate jurisdiction. Jett Bros. Co. v. City of Carrollton, 252 U.S. 1 (1920); Miller v. Board of County Comm'rs., 290 U.S. 586 (1933); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 650 (1942); Charleston Fed. Savs. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-86 (1945); Wilson v. Cook, 327 U.S. 474, 480-82 (1946). *See also* Reeves v. Williamson, 317 U.S. 593 (1942) (appeal dismissed for want of jurisdiction under predecessor statute to 28 U.S.C. § 1254 (2)).

ments that the award of punitive damages is improper. We need consider only one, the claim of federal preemption" (J.S.App. 21a). In addition, the court clearly identified the narrow ground upon which it denied punitive damages:

> A *judicial award* of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. *Thus we hold punitive damages may not be awarded in this case.*

J.S.App. 24a (emphasis added). Thus, the Tenth Circuit's holding pertains to the judicial award of punitive damages in this case, and does not draw into question or decide the validity of a statute authorizing such damages generally, or as applied to areas of the law within the state's authority to control.

Exercising appellate jurisdiction in this case would make virtually any action authorized by state law and held to be invalid by a federal court of appeals reviewable on appeal even though the underlying statute is not placed under attack. Construing § 1254(2) in such a broad way would invite appeals to the detriment of this Court's ability to respond to the many cases brought under discretionary review, and would defeat the purpose of the statute. *See,* Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925,* 35 Yale L.J. 1 (1925).

The appellant cites several cases in which jurisdiction was invoked under § 1254(2) where a state statute was held invalid *as applied* (Appellant's Br. 3).[17] Those cases are readily distinguishable. In each, a specifically identified statute is expressly held by the court of appeals to be invalid as applied. In each, the challenged statute is fully analyzed and is the focus of the court's holding. In direct contrast to the cases cited by the appellant, here the challenged statute is neither construed nor identified as being the subject of the court's holding. The court

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[17] Malone v. White Motor Corp., 435 U.S. 497 (1978); Dutton v. Evans, 400 U.S. 74 (1970); City of Detroit v. Murray Corp., 355 U.S. 489 (1958).

never analyzed the statute's validity or applicability to the unique facts of this case. This is particularly germane since the compensatory award for alleged personal injuries upon which the punitive damage claim was premised has itself been reversed on state grounds.[18]

As the Court stated in *Memphis Natural Gas* v. *Beeler*, 315 U.S. 649. 651 (1942), the Judicial Code was intended "to foreclose an appeal as of right whenever the prescribed conditions have not been *rigorously* fulfilled" (emphasis added). Here those conditions have not been fulfilled at all and the appeal should be dismissed.

Finally, the Court should not accept this case on certiorari under 28 U.S.C. § 2103. There is no conflict among the circuits on the preemptive effect of the Atomic Energy Act; indeed, they are unanimous in following *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, *aff'd mem.*, 405 U.S. 1035 (1972).[19] Moreover, the appellant concedes that this is the "first case involving nuclear power in which punitive damages have been awarded by a jury" (J.S. 13), demonstrating that it is not a question that arises frequently. Surely the unique facts of this case would have only slight precedential value. Additionally, since the court of appeals held that compensatory damages are available for nuclear accidents, there is no fear that a legitimate claimant would be deprived of compensation for any injuries actually sustained.

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[18] Appellants also rely on California v. Grace Brethren Church, 102 S.Ct. 2498 (1982) to support jurisdiction even where the lower court has not expressly held a statute unconstitutional as applied (Appellant's Br. 4). However, the appeal there is based on 28 U.S.C. § 1252, which the Court distinguished from other jurisdictional statutes noting that it stood as "an unambiguous exception to the policy of minimizing the mandatory docket of this Court." *Id.* at 2506. Further, unlike this case, the invalidity of the statute was a necessary predicate to the court of appeals decision in that case.

[19] *See* Washington States Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982); Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982).

II.

THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, PREEMPTS IMPOSITION OF PUNITIVE DAMAGES IN THIS CASE

A. Congress Intended to Occupy Entirely the Field of Nuclear Safety

This Court recently decided a case which controls the disposition of this action. In *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, ____ U.S. ____, 103 S.Ct. 1713 (1983), Justice White, writing for the majority, set forth a comprehensive analysis of the preemptive scope of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, and firmly established that the federal government's authority over radiation safety is absolute, completely displacing any authority of the states. The Court held that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." 103 S.Ct. at 1726. The Court stated:

> from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day . . . the federal government maintains complete control of the safety and "nuclear" aspects of energy generation. . . .

Id. The Court also noted that "Congress . . . intended that the federal government regulate the radiological safety aspects involved . . . in the construction and operation of a nuclear plant." *Id.* at 1723.[20] The Court based its analysis on several

[20] The Court recognized the dichotomy between the *economic* concerns involved in the generation, sale and transmission of nuclear power, which Congress explicitly recognized as a state responsibility, and the *safety* concerns of nuclear power, which Congress intended to be exclusively within the federal province. Regulation of the possession and use of special nuclear materials, because it is safety regulation, is a subject as to which "no role was left for the states." 103 S.Ct. at 1724.

provisions of the Atomic Energy Act, including § 274(k), 42 U.S.C. § 2021(k), which authorizes state regulation "for purposes other than protection against radiation hazards."[21]

The Court's analysis of Congress' intent to assert exclusive federal control in the area of radiation hazards is consistent with previous pronouncements by this Court and with the holdings of every court of appeals that has considered the issue, beginning with the watershed *Northern States* case.[22] Indeed, the exclusive authority of the federal government in this area has never been seriously disputed. The Tenth Circuit, in its decision below, adhered to these principles in holding that the award of punitive damages intrudes upon the exclusive federal authority to regulate radiation hazards and is preempted.

There are several reasons why Congress decided to assume exclusive control of radiation hazards. First, Congress' dual

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[21] Congress' intent to occupy entirely the field of nuclear safety is manifested unambiguously in the language of the 1954 Act and subsequent amendments and in the related legislative history. *See* Northern States Power Co. v. Minnesota, 447 F.2d at 1147-54. For a detailed analysis of the legislative history of the Atomic Energy Act and amendments, see Murphy & LaPierre, *Nuclear Moratorium Legislation in the States and the Supremacy Clause*, 76 Colum. L. Rev. 392, 394-414 (1976).

[22] *See* Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 16 (1976) (court recognized the "absence of any room for a state role" in the regulation of radiation hazards); Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1149 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (court recognized "Congressional . . . intention that the states possess no authority to regulate radiation hazards"); Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571, 581 (7th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 469 (1982) (court found "Congress intended . . . to preempt state regulation of radiological hazards"); Washington States Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) (court stated that Congress had "not waived or delegated its authority" over radioactive waste disposal).

purpose of protecting the public safety while at the same time encouraging private sector participation in the development of nuclear energy requires a delicate balancing of interests which can only be accomplished by exclusive federal control. The balance is achieved through the pervasive federal regulatory scheme created by the Atomic Energy Act. *See Pacific Gas & Electric,* 103 S.Ct. at 1717.[23] The regulations promulgated pursuant to the Atomic Energy Act have been described as a "scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *AEC,* 400 F.2d 778, 783 (D.C. Cir. 1968). *See also, Northern States Power Co.* v. *Minnesota,* 447 F.2d at 1153.

Second, exceptional scientific and technical expertise is required to regulate the complexities of radiation hazards and plant operations.[24] Congress felt that the states lacked the

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[23] The balance between safety and progress was recognized by the AEC in its report to the Joint Committee on Atomic Energy in the hearings on the 1954 Act:

> The potentialities of atomic energy continue to be attended by problems of control which call for an unusual degree of Federal participation. Nevertheless, we are confident that the inescapable restrictions and safeguards which society must impose on the utilization of atomic energy can be made consistent with allowing freedom of initiative to power producers; that the special problems of atomic energy can, without risk to security or safety and without unfair advantage to any group be reconciled with the proper roles of industry and Government as conceived in this country.

Hearings on S.3323 and H.R. 8862 Before the Joint Comm. on Atomic Energy to Amend the Atomic Energy Act of 1946, 83d Cong., 2d Sess. 575 (1954) (testimony of Commissioner Murray).

[24] For example, the "Standards for Protection Against Radiation," 10 C.F.R. Part 20, adopted by the AEC in 1957, were the result of several decades of research on the biomedical effects of radiation conducted by the leading scientists in the field for the National Committee on Radiation Protection and the International Commission on Radiological Protection. *See* Taylor, *Standards For Protection Against Radiation,* 12 Atom. Energy L.J. 139 (1970); Frampton, *Radiation Exposure—The Need For A National Policy,* 10 Stan. L. Rev. 7 (1957).

technical expertise necessary to deal with these matters. Even when the 1959 Amendment to the Atomic Energy Act[25] was enacted giving certain authority to the states, the AEC indicated that "certain areas would be excluded [from state regulation] because the technical safety considerations are of such complexity that it is unlikely that any state would be prepared to deal with them. . . ." *Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships*, 86th Cong., 1st Sess. 294 (1959). *See also, id.* at 291-92; S. Rep. No. 870, 86th Cong., 1st Sess. 8 (1959).[26]

Congress' total occupation of the nuclear safety field is evidenced by the comprehensive regulatory and licensing scheme administered by the NRC, successor to the AEC. Congress vested in the Commission the power to license special nuclear material, 42 U.S.C. § 2073, to establish regulations "to govern the possession and use of special nuclear material," 42 U.S.C. § 2201(b), and to govern the "design, location, and operation of facilities" which use such material, 42 U.S.C. § 2201(i)(3).

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[25] 42 U.S.C. § 2021.

[26] Though the 1959 Amendment provided some role for the states, Congress intended that state participation be carefully circumscribed. The turnover of authority to regulate nuclear materials can only occur when the Commission is satisfied that the state program is compatible with the federal program and is adequate to protect the public health and safety. 42 U.S.C. § 2021(d)(2). The state standards for protection against radiation hazards must be the same as federal standards. S. Rep. No. 870, 86th Cong., 1st Sess. 9, 11 (1959). The Commission has the power to terminate its agreement with a state if necessary to protect the public health and safety. 42 U.S.C. § 2021(j). Finally, the more hazardous aspects of nuclear power cannot even be turned over to the states. 42 U.S.C. §§ 2021(b)(4), 2021(c). Oklahoma has not entered an agreement with the NRC under 42 U.S.C. § 2021, but even if it had it would not be able to assert any regulatory authority here because Kerr-McGee was licensed to possess special nuclear material in a quantity sufficient to form a critical mass. 42 U.S.C. § 2021(b)(4).

Through its regulations and license conditions, the Commission is able to monitor and maintain strict control over its licensees, regulating every aspect of nuclear fuel processing, including Kerr-McGee's plant. As mentioned above, the Commission maintains standards for protection against radiation which sets forth permissible radiation exposure levels. 10 C.F.R. Part 20. In 10 C.F.R. Part 70 the Commission sets forth the terms and conditions upon which special nuclear material will be licensed. No license will be issued unless the Commission determines that the applicant has qualified personnel, equipment and procedures adequate to protect health and safety. 10 C.F.R. § 70.23. Other safety aspects which the Commission regulates include the radiation monitoring system of the plant, the physical security of the plant and nuclear materials, and protection against theft or sabotage of nuclear materials. 10 C.F.R. §§ 70.23, 70.24, 73.1. The Commission has detailed regulations covering material balance, inventory, and record keeping for special nuclear materials. 10 C.F.R. §§ 70.51, 70.53. The Commission also regulates the instructions which must be given to workers, including such topics as health protection problems associated with exposure to radiation, precautions to minimize exposure, and the functions of protective devices. 10 C.F.R. § 19.12. All the alleged conduct cited by the appellant (Appellant's Br. 12-16) purporting to support the award of punitive damages, in addition to being unrelated to Silkwood's exposure,[27] is already regulated by the Commission regulations.

Congress has also provided an array of enforcement mechanisms, some of which deal with willful conduct. The Act provides for investigation, injunctive relief, civil and criminal penalties, and suspension or revocation of a license for conduct

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[27] The plaintiff proffered no evidence whatever of the conduct that caused or permitted Silkwood's contamination (III J.A. 902; Tr. 3443).

in violation of the Act or regulations. 42 U.S.C. §§ 2271, 2280, 2282, 2272-73, 2236. Civil penalties can be assessed in amounts up to $100,000 per violation. If the violation is a continuing one, each day constitutes a separate violation. 42 U.S.C. § 2282.[28] Willful conduct can lead to a criminal conviction resulting in substantial fines and imprisonment. 42 U.S.C. §§ 2272-73. Where a violation is willful, the Commission may summarily revoke the violator's license without prior notice or opportunity to demonstrate compliance. 10 C.F.R. §§ 2.202, 70.61.[29]

In the face of such explicit evidence of congressional intent to assert a wide-ranging governance over the safety aspects of nuclear power, the appellant suggests that the 1954 Atomic Energy Act and the 1959 Amendment relate only to licensing and administrative regulation and their preemptive scope does not extend to regulation by way of punitive damages (Appel-

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[28] The NRC has frequently exercised its power to impose civil fines. In 1982 alone it imposed the following fines on reactor licensees: Boston Edison ($550,000); Carolina Power & Light ($40,000); Cincinnati Gas & Electric ($200,000); Consolidated Edison ($185,000); Consolidated Edison ($40,000); Consumers Power ($16,000); Dairyland Power ($25,000); Georgia Power ($50,000); Maine Yankee ($30,000); PSE&G ($40,000); TVA ($50,000); VEPCO ($50,000); Carolina Power & Light ($120,000); Commonwealth Edison ($100,000); Georgia Power ($20,000); Portland General Electric ($50,000); Southern California Edison ($60,000); Duke Power ($44,000); Illinois Power Co. ($90,000); Indiana & Michigan Electric ($52,000); PSE&G ($40,000); Vermont Yankee ($40,000). *See* Enforcement Actions: Significant Actions Resolved, U.S. Nuclear Regulatory Commission, NUREG-0940, Vol. 1, Nos. 1-4 (1982). Recently, the NRC proposed a fine of $850,000 against PSE&G. *See* Wall Street Journal, May 9, 1983, p. 18.

[29] Numerous sections of the regulations recognize that "[a]ny person who willfully violates any provision of the Act or any regulation or order issued thereunder may be guilty of a crime and, upon conviction, may be punished by fine or imprisonment or both." *See, e.g.*, 10 C.F.R. §§ 19.30, 20.601, 40.81, 70.71 (1983).

lant's Br. 23, 27, 29). This is an impermissibly narrow reading of the legislation and is contrary to this Court's holding in *Pacific Gas & Electric* that the Atomic Energy Act preempts *all* radiation safety matters except those expressly ceded to the states. To limit the preemptive scope of the Act and the 1959 Amendment only to administrative-type regulation, as the appellant suggests, would elevate form over substance and defeat Congress' intention to exercise total control over safety matters. The language of the statute and statements in the legislative history are broad and unconditional in their assertion of authority. Nowhere in the Act or legislative history does Congress indicate that federal control over safety matters should be limited to specified modes of regulation. The absence of any express reference to punitive damages cannot be construed as giving that mode of regulatory authority to the states. On the contrary, only those roles which Congress clearly intended to leave to the states are outside the scope of the preemption, and it has never indicated such an intent with respect to punitive damages.

B. Punitive Damages Fall Within the Occupied Field of Regulation of Nuclear Safety Concerns

When the federal government completely occupies a given field or an identifiable portion of it, "the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " *Pacific Gas & Electric*, 103 S.Ct. at 1726.[30] In this case, punitive damages were awarded for the sole purpose of punishing an NRC licensee for the general operating conditions of its plant rather than for specific conduct causing injury to Silkwood (of which there was no proof). This type of regulation of plant operating conditions falls squarely within the field occupied by the federal government.

This Court set forth the dual purposes underlying an award of punitive damages in *Smith* v. *Wade*, ____ U.S. ____, 103 S.Ct. 1625 (1983): "punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' " *Id.* at 1639.[31] Any suggestion that exemplary

[30] The appellant argues that Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) requires a showing of irreconcilable conflict between the federal scheme and a state common law remedy before the latter is preempted (Appellant's Br. 22). Since the *Pacific Gas & Electric* case has already addressed the subject matter at issue in this case (regulation of radiation hazards) and found that Congress completely occupied the field, the *Nader* case, which involves a completely different statutory scheme (regulation of aviation), is not controlling.

[31] Although in *Smith* v. *Wade* this Court was divided on the question of the proper standard for an award of damages under § 1983, the majority and dissent agreed that punitive damages are awarded to punish and deter wrongful conduct.

damages have additional functions, such as compensation, is contradicted by this Court's explicit statement in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981): "[p]unitive damages, by definition are not intended to compensate the injured party."[32] Under Oklahoma law, a complaining party is allowed to recover exemplary damages not because his position is meritorious, but because society is benefited by deterring wrongful conduct. Thus, if a punitive award will neither punish nor have a deterrent effect, the award will be disallowed. *Nixon* v. *Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976). Moreover, punitive damages cannot be awarded unless actual damages are awarded. *Davidson* v. *First Bank & Trust Co.*, 609 P.2d 1259 (Okla. 1976).

The very nature of punitive damages is regulatory. They are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The power to award punitive damages elevates a jury, untrained in the complexities of nuclear technology, to a position where it can usurp the regulatory judgment of the NRC in determining what radiation exposure levels are permissible and what safety measures must be taken. Further, the punishment and deterrent purposes of punitive damages serve a regulatory function in that they directly affect the standard of care exercised by a defendant. The impact of a punitive damages award is no less substantial than a statute enacted by a state legislature or a regulation

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[32] The fundamental distinction between punitive damages and compensatory damages was articulated by Justice Brennan in Smith v. Wade, 103 S.Ct. at 1638:

> punitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct. . . . Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

promulgated by a state administrative agency.[33] Indeed, regulation by an award of punitive damages is more powerful than a statute or formal administrative regulation because the amount of the award is often arbitrary and generally uncontrollable, *IBEW* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979), and the regulatory standard is vague, amorphous, and pronounced after the fact. The conclusion that exemplary damages are regulatory in nature is so compelling that the appellant has abandoned its earlier argument and admits that "regulation can be as effectively asserted through an award of damages as through some form of preventive relief." Appellant's Br. 43, *quoting, San Diego Unions* v. *Garmon*, 359 U.S. 236, 247 (1959).

Punishment and deterrence of nuclear licensees are not powers that Congress has expressly ceded to the states. There is no indication, express or implied, that Congress ever intended these functions to be controlled by the states. Therefore, the state effort to punish and deter conduct related to radiation hazards, as exercised in the form of punitive damage awards, is preempted by federal occupation of the field.

The appellant attempts to circumvent a finding of preemption by arguing that punitive damages were awarded in this case merely to regulate Kerr-McGee's "state of mind" (Appellant's Br. 44-48). Thus, according to the appellant, the regulation effected by the award was for "purposes other than protection against radiation hazards." 42 U.S.C. 2021(k). This sophistic argument ignores the fact that the supposed "outrageous conduct" in this case involves the allegedly unsafe

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[33] Thus, the Tenth Circuit properly relied on Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) in finding preemption of punitive damages. Prohibiting the emission of radioactive effluents by administrative regulation, as occurred in *Northern States*, is no different than permitting a private plaintiff to recover punitive damages against an NRC licensee who has emitted such effluents to punish the licensee and deter him from doing it again.

manner in which Kerr-McGee conducted its operations at its plutonium processing facility. The district court noted that "punitive damages in this case were awarded for conduct that caused or permitted the escape of plutonium and led to the contamination of Silkwood in her apartment" (J.S.App. 72a). Thus, in imposing punitive damages in this case, the jury was not merely punishing a state of mind, they were prescribing the manner in which Kerr-McGee must conduct the operations in its plutonium plant. This Court stated in *Pacific Gas & Electric* that state regulation of the *operation of a nuclear power plant* is impermissible because "such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." 103 S.Ct. at 1726.

Although the purposes underlying the award of punitive damages in matters of state concern may serve a societal interest, the appellant's characterization of such damages as a "state tort right" that is "deeply rooted in local feeling and responsibility" (Appellant's Br. 46) exaggerates the historical importance of punitive damages as well as a state court's role in awarding them. Because punitive damages are not a part of the compensatory scheme and are actually windfalls to a successful plaintiff, they have been the subject of vigorous criticism for many years.[34] In his dissent in *Smith v. Wade,* Justice

[34] Many courts have noted that punitive damages are not a "favorite in the law." *See, e.g.,* Linscott v. Rainier Nat. Life Ins. Co., 606 P.2d 958 (Idaho 1980); Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978). Moreover, the doctrine of exemplary damages has been subjected to a variety of constitutional attacks including violation of due process, equal protection and the prohibition against double jeopardy. *See* Ghiardi & Kircher, *Punitive Damages* §§3.01-07 (1983); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures,* 69 Va. L. Rev. 269 (1983).

Rehnquist summarized this Court's prior holdings concerning punitive damages:

> [P]unitive damages are frequently based upon the caprice and prejudice of jurors. (Citation omitted). We observed in *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979), that "punitive damages may be employed to punish unpopular defendants," and noted elsewhere that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Finally, the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined.

103 S.Ct. 1641-42. Justice Rehnquist also noted that "a significant number of American jurisdictions refuse to condone punitive damage awards." *Id.* at 1642.

The appellant's statement that punitive damages serve an interest which "belongs peculiarly to the states" (Appellant's Br. 44) finds no support in legal experience or in the circumstances of this case. The functions of punishment and deterrence are hardly within the exclusive province of a state court. For example, this Court has held that an award of punitive damages is available in a federal action brought under 42 U.S.C. § 1983. *Smith* v. *Wade*, 103 S.Ct. 1625. Moreover, punishment in the form of civil and criminal penalties is commonly levied by federal regulatory agencies, including the Nuclear Regulatory Commission (*see* footnote 28, *supra*). When a deterrent mechanism is already provided by a regulatory agency, a state has no compelling reason to provide a private plaintiff a forum in which to receive punitive damages.

The imposition of a punitive sanction upon a nuclear licensee, in particular, is a matter of federal rather than local control. The nuclear industry is a field in which the government at one time held a monopoly and in which it has continued to maintain a controlling position. Because the hazards of nuclear

materials must be carefully balanced with the nation's energy and defense needs, the interest of the federal government in exercising complete control over the operations of licensed facilities overshadows any local interest in accomplishing an objective that may be performed by the NRC.[35]

The appellant argues that if punitive damage awards are preempted, compensatory damage awards must also be preempted since all damage awards regulate a defendant's standard of conduct (Appellant's Br. 43). Since the Tenth Circuit affirmed the property damage award, the appellant contends that there exists a basic inconsistency in the Tenth Circuit's analysis. This argument overlooks the fact that certain powers have been ceded to the states either through specific legislative enactments or through congressional intent as evidenced by the legislative history of the Atomic Energy Act and its amendments. For example, Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants in the Clean Air Act Amendments of 1977, 42 U.S.C. § 7422, and to impose certain siting and land use requirements for nuclear plants in the NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980). Another area specifically ceded to the states is the compensation of tort victims of a nuclear incident that does not rise to the level of an

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[35] The labor law cases cited by the appellant do not concern conduct which the federal government has an overriding interest in controlling. *See, e.g.*, Farmer v. Carpenters, 430 U.S. 290 (1977) (plaintiff complained of public ridicule, verbal abuse, and other methods of harassment); United Automobile Workers v. Russell, 356 U.S. 634 (1958) (plaintiff threatened with bodily harm and generally intimidated); United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) (plaintiff threatened and intimidated). Moreover, those cases involve an entirely different regulatory scheme than the one under analysis in this case. As the Court stated in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973): "Our prior cases on preemption are not precise guidelines in the present controversy, for each case turns on the particularities and special features of the federal regulatory scheme in question."

extraordinary nuclear occurrence. This delegation is made clear in the legislative history of the Price-Anderson Act, 42 U.S.C. § 2210. *See* discussion p. 34-39, *infra*. Thus, the appellant's claim that the Tenth Circuit was inconsistent in finding no preemption of compensatory damages while holding punitive damages preempted has no merit. Even if compensatory damages do have some regulatory effect on radiation safety concerns, they fall in an area specifically delegated to the states.

The appellant has advanced no new argument which would prevent this Court from adhering to the preemption analysis set forth in *Pacific Gas & Electric*.[36] Because punitive damages serve a regulatory function that falls within a field occupied by the federal government, such awards are preempted.

C. Punitive Damages Are Preempted Because They Are an Obstacle to the Accomplishment of the Purposes of the Federal Nuclear Regulatory Scheme

In addition to being preempted when Congress has occupied the field, state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

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[36] The appellant's suggestion that an NRC licensee could intentionally injure someone and be immune from punishment is untrue as well as inapplicable here. There is no evidence that Kerr-McGee intentionally caused the plutonium to be in Silkwood's apartment. In refusing to give an instruction on intentional contamination, the trial judge stated: "I don't think there's any evidence to sustain that . . ." (Tr. 9984). The Tenth Circuit agreed (J.S. App. 8a). In any event, there could never be an "intentional contamination" which would not constitute a flagrant and manifold violation of NRC regulations and the operator's license conditions, as well as the criminal laws. *See, e.g.*, 10 C.F.R. §§ 70.3, 70.71.

1. Punitive Damages Frustrate Congress' Intent to Promote and Develop Nuclear Energy

The purposes and objectives of Congress concerning the nuclear energy industry are expressed in the Atomic Energy Act which sets forth a program "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." 42 U.S.C. § 2013(b). The promotion of nuclear power continues to be a primary purpose of the Act today. Indeed, in *Pacific Gas & Electric,* this Court dismissed the argument that legislation enacted in recent years indicates a congressional intent to abandon the objective of promoting nuclear power:

> [A] suggestion that legislation since 1974 has indicated a "change in Congressional outlook" is unconvincing. . . . The continuing commitment to nuclear power is reflected in the extension of the Price-Anderson Act's coverage until 1987, Pub. L. No. 94-197, § 2-14, 89 Stat. 1111-1115, as well as in Congress' express preclusion of reliance on natural gas and petroleum as primary energy sources in new power plants.

103 S.Ct. at 1731.[37]

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[37] In the Nuclear Safety Research, Development and Demonstration Act of 1980, 42 U.S.C. §§ 9701-08, Congress expressly accepted the importance of nuclear power in its finding that "nuclear energy is one of the two major energy sources available for electric energy production in the United States during the balance of the twentieth Century." 42 U.S.C. § 9701(a)(1). Both the Act and its legislative history reaffirm Congress' commitment to promote nuclear power. The Act establishes a detailed system of studies and research programs to assure the continued safety and viability of nuclear energy. Congress would not enact such a comprehensive research and development program if nuclear power were not to be promoted as a significant energy resource.

The availability of punitive damages would conflict with Congress' continuing desire to promote and develop nuclear energy. Because exposure to unlimited exemplary liability would necessarily inhibit participation in the nuclear industry, the development of nuclear power would be impeded. This is particularly true here where there is no evidence of conduct by Kerr-McGee causing the personal injury, but only general allegations of unsafe plant operations. This conclusion is supported by this Court's holding in *IBEW* v. *Foust*, 442 U.S. at 52, that punitive damages may not be awarded against unions for breach of the duty of fair representation because the arbitrary nature of such damages creates a "chilling effect" which would impair the effectiveness of unions. *See also, Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (punitive damages are precluded where they might impair First Amendment rights).

The arbitrary and capricious nature of exemplary damages distinguishes such awards from fines levied pursuant to the civil penalties provisions of the NRC regulations. While the penalties imposed by the NRC may be severe, they are not subject to the whims of a jury and thus do not create the same "chilling effect." To achieve and maintain active participation in the nuclear energy industry, it is imperative that licensees not be subjected to after-the-fact standards that are nothing more than a "moving target."

The conflict created by an award of punitive damages is magnified when a licensee is subjected to extreme awards even though it is in compliance with the federal regulatory scheme. One need not speculate as to the potential for mischief; in this case, the AEC found that Kerr-McGee was in compliance with AEC regulations as they related to Silkwood's alleged injury and property damage (Def. Exh. 37, II J.A. 729-790, Tr. 6154), yet a civil jury apparently concluded that those regulations did not impose a high enough standard. Such second-guessing by a jury clearly frustrates the objectives which the Commission sought to accomplish in creating and administering its regulations.

2. Punitive Damages Conflict With Congress' Express Intent to Preclude Dual Regulation of Radiation Hazards

Congress has recognized the need for expertise and uniformity in the regulation of radiological hazards. In 1959, Congress amended the Atomic Energy Act of 1954 to add Section 274, 42 U.S.C. § 2021, which recognized and defined the role of the states in connection with nuclear energy regulation. The Senate Report accompanying the amendment states that "[section 274] is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards. . . . The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both." S. Rep. No. 870, 86th Cong., 1st Sess. 9 (1959). AEC Chairman Graham testified that after carefully examining the entire problem of federal-state relations, "we have decided that it would be undesirable to provide for the exercise of dual or concurrent jurisdiction." *Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships*, 86th Cong., 1st Sess. 290 (1959). Mr. Lowenstein, Office of the General Counsel, AEC, explained that concurrent jurisdiction would be a waste of manpower and funds, and that it would lead to divided responsibilities and bad safety controls. *Id.* at 315.

After recognizing the undesirability of concurrent state and federal regulation of radiation hazards, Congress determined which regulatory functions could be delegated to the states. Congress' refusal to delegate the functions of punishment and deterrence indicates its desire and intent that those responsibilities be maintained exclusively by the federal government. If a state were allowed to perform those functions simultaneously, Congress' intent to preclude concurrent regulation would be frustrated.

Moreover, Congress' intent to achieve uniformity of regulation would be obstructed. When the state and federal governments attempt to perform identical regulatory functions, the potential for conflict is obvious. This Court in *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959) stated:

> Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

Id. at 244. Here, the trial court's instructions invited the jury to award punitive damages irrespective of Kerr-McGee's compliance with AEC regulations.[38] If uniformity is to be maintained and conflict avoided, the establishment of operational standards for NRC licensees cannot be placed in the hands of judges and jurors. The NRC must be the sole regulator in this area. Only through the application and enforcement of uniform health and safety standards promulgated by a national agency will the objectives of Congress be realized. *Northern States Power Co.* v. *Minnesota*, 447 F.2d at 1153-54.

D. The Price-Anderson Act Does Not Sanction State Imposition of Punitive Damages

The Price-Anderson Act, 42 U.S.C. § 2210, was enacted in 1957 as an amendment to the Atomic Energy Act of 1954. Because of the risk of extensive liability in the event of an accident, private industry had been reluctant to enter the nuclear energy field. The Price-Anderson Act was intended to reduce this hesitancy by putting a ceiling on the liability of

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[38] *See* Instructions 10, 12, and 27 (J.S.App. 101a, 103a, 118a). Instruction 12 states that a finding of compliance "would not necessarily preclude a finding of blameworthy conduct" meriting an award of punitive damages (J.S.App. 103a).

nuclear licensees and by providing government indemnification for additional amounts of liability. In 1965 the Act, which was to expire in 1967, was extended for another ten year period. Pub. L. 89-210, 79 Stat. 855 (1965). In 1966 Congress amended the Act to set up a "waiver of defenses" system whereby nuclear licensees waive certain traditional defenses in situations involving a major nuclear catastrophe. 42 U.S.C. § 2210(n). This system eliminated the vagaries of different state laws on the issues of strict liability and the statute of limitations without the necessity of enacting a substantive federal tort law. In 1975 the Act was again extended for another ten years. Pub. L. 94-197, 89 Stat. 1111 (1975).

The appellant places heavy reliance on the Price-Anderson Act in an attempt to fashion a congressional intent to sanction state awards of punitive damages against federal licensees in suits involving radiation hazards. The appellant cites numerous references in the legislative history indicating a congressional intent that the provisions of Price-Anderson would cause only "minimal interference" with state tort law (Appellant's Br. 30-35). However, to strain these references to authorize or approve punitive damages would distort the purpose of the Act and conflict with Congress' manifest intent to keep safety regulation in the federal realm. Consequently, the references to state tort law must be read as referring to state tort law for purposes of compensation only.[39]

The references to state tort law also must be read in the full context of the Price-Anderson Act. The thrust of the original Act in 1957 and the "waiver of defenses" amendments in 1966 was to compensate the public, not punish nuclear licensees. The "clear intent" of Congress was to assure "that the public would receive prompt and adequate financial compensation" for any damage resulting from potential nuclear incidents. S.

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[39] *See* Comment, *Implied Preemption of Punitive Damages for Nuclear Accidents*, 29 Am. U. L. Rev. 741, 765-68 (1980).

Rep. No. 650, 89th Cong., 1st Sess. 5 (1965).[40] At the same time, Congress wanted to moderate the deterrents to private industrial participation in the nuclear industry. S. Rep. No. 296, 85th Cong., 1st Sess. 1 (1957). In all its consideration of the Price-Anderson Act and its amendments, Congress made no indication, express or implied, that it intended to authorize or approve punitive damages.

Clearly, the intent of Price-Anderson was not to grant the general public or the states means to punish or regulate the conduct of nuclear operators.[41] Rather, Congress' sole intent was to provide compensation to those injured from radiation accidents. This intent was carried out in several ways. In the 1957 Act, insurance (or "financial protection") requirements were imposed on licensees. 42 U.S.C. § 2210(a). Indemnity by the government was provided for incidents involving damages in excess of available insurance coverage. 42 U.S.C. § 2210(c). In the 1966 Amendment concerning waiver of defenses, Congress acted to remove any uncertainty about the compensation

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[40] There are numerous other references in the legislative history to the compensatory purpose of the Act. *See, e.g., Hearings Before the Joint Comm. on Atomic Energy on Government Indemnity,* 85th Cong., 1st Sess. 9 (1957) (the bill eliminates possible gaps in the availability of *compensation* to the public); *id.* at 169 (the government must assure the public that it will be *compensated* for losses); S. Rep. No. 454, 94th Cong., 1st Sess. 14-17 (1975) (references to *compensation* of claimants); S. Rep. No. 1605, 89th Cong., 2d Sess. 9-10 (1966) (concern that inability to prove negligence may cause victims to go without *compensation*). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 93 (1978) (Price-Anderson is a mechanism for *compensating* victims).

[41] In fact, a statement in S. Rep. No. 296, 85th Cong., 1st Sess. (1957), indicates that willful misconduct should be dealt with through administrative action. In noting that losses resulting from willful misconduct would be covered by the insurance and indemnity provided by the Act, the Report adds: "However, the circumstances surrounding any nuclear incident, including the willfulness, would certainly be grounds for examining and possibly suspending the operations under the license." *Id.* at 18.

of legitimate victims of a major nuclear accident by removing the potential legal obstacles of negligence and contributory negligence from any suit. Because of the uncertainty of whether strict liability would be available, Congress feared that legitimate claims might be left uncompensated. S. Rep. No. 1605, 89th Cong., 2d Sess. 3-4 (1966). To prevent this, a no-fault compensation system was created for extraordinary nuclear occurrences.

These were the principal concerns of Congress and the legislative history must be read in that light. Congress was concerned with providing compensatory financial protection and assuring no-fault recovery without changing the substantive laws of the states. This intent should not be transformed into a congressional authorization of state intrusion into the exclusive federal field of punishing licensees and regulating the way in which they conduct the safety operations of their plant.

Further, punitive damage awards would defeat the main purposes of Price-Anderson. The two basic goals of the Act are to assure the availability of funds to compensate victims of nuclear accidents and to encourage private industrial participation in the nuclear energy field. 42 U.S.C. § 2012(i); S. Rep. No. 650, 89th Cong., 1st Sess. 4 (1965). In the event of a major nuclear accident, windfall punitive awards to some claimants could reduce the insurance and indemnity fund available to compensate other victims. Moreover, the appellant's construction would have the government creating an elaborate system of insurance and compensation, in large measure to secure future nuclear industry development, only to chill that participation by permitting capricious punitive awards. Finally, punitive awards would result in the anomalous situation that the federal government, through the indemnity funds it provides, might itself be paying punitive damages to a plaintiff (even though the financial protection of that person had already been accomplished by a compensatory damage award).

The appellant's argument that Congress considered and rejected a proposed amendment expressly forbidding punitive damages (Appellant's Br. 19, 36-37) is contrived. The appellant's treatment of the views of Professor Cavers is misleading in that it inflates a single paragraph of a law review article into a "proposed ... amendment" to the Price-Anderson Act (Appellant's Br. 37). The appellant's implication is that the Joint Committee on Atomic Energy (JCAE) and even Congress as a whole gave this single paragraph of the article (which was buried among the 41 appendices to the 1965 Hearings) detailed consideration and made a reasoned rejection of the "proposal." In Professor Cavers' testimony (which was given in 1965, before the Committee was even considering the waiver of defenses amendment) punitive damages are never even mentioned.[42] The bill actually submitted to the JCAE in 1966 and eventually enacted by Congress was silent on the issue of punitive damages. H.R. 15913, 89th Cong., 2d Sess. (1966).

Equally meritless is the appellant's claim that the AEC has implemented the 1966 Amendments in a manner which shows that punitive damages are not preempted (Appellant's Br. 38-39). The appellant cites language from a nuclear energy liability insurance form which states that the waiver of defenses does not apply to a claim for punitive damages. 10 C.F.R. § 140.91, Appendix A. The cited language does not constitute a recognition by the NRC that punitive damages are not preempted, but rather highlights the compensatory nature of the Price-Anderson scheme. The AEC's explanation for making the waivers inapplicable to punitive damage claims was that "the intent of the legislation is to assure *compensation* for injury...." 33 Fed. Reg. 6982 (1968) (emphasis added). Thus, the

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[42] *Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy on Proposed Extension of AEC Indemnity Legislation*, 89th Cong., 1st Sess. 211-223 (1965).

language in the insurance form shows no more than the fact that the Commission did not want to foster or facilitate claims for punitive damages in cases of extraordinary nuclear occurrences and made the waivers inapplicable to such claims.[43] Further, the language in the insurance form does not address the question of preemption and cannot be taken as an official interpretation by the Commission on that question. On the contrary, the only official interpretation the Commission has issued on preemption emphasizes the broad scope of preemption under the Act. *See,* 10 C.F.R. § 8.4(i) (Congress intended to preempt the "total responsibility and authority" over radiation hazards).

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[43] The insurance form referred to by appellant is not a required form but is merely one which would be acceptable to the Commission. *See* 10 C.F.R. § 140.15(a)(3). For this reason, the NRC recently issued a proposed rule to remove this form insurance policy from the Code of Federal Regulations. 48 Fed. Reg. 9284-85 (1983).

The court below fully accommodated the interest of compensating victims of nuclear accidents by recognizing that in Oklahoma the law of strict liability is available in such situations. In holding that punitive damages are preempted in this case, it also accommodated the interest of preserving exclusive federal control over the safety aspects of nuclear power.[44]

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[44] The appellant has argued, in a cursory fashion, that the Tenth Circuit's decision violates the due process and equal protection guarantees of the Constitution because it precludes the submission of a punitive damages claim to a jury and fails to provide a substitute remedy for punitive damages (Appellant's Br. 49 n.48). These contentions are without merit.

Under the circumstances presented in this case, the principles of due process and equal protection require no more than that Congress' decision to preclude punitive damages not be "demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 84 (1978). Here, the legislative determination to preclude awards of punitive damages is neither arbitrary nor irrational; rather, it is logically related to the goals of implementing a uniform federal regulatory scheme for radiation hazards and encouraging private participation in the nuclear industry.

Indeed, the Court in *Duke Power* specifically noted that "in general, limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power . . ." 438 U.S. at 86. The Ninth Circuit in *In Re* Paris Air Crash, 622 F.2d 1315 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980), applied *Duke Power* in considering the constitutionality of a state's disallowance of punitive damages under a punitive damage statute in wrongful death suits. Finding the wrongful death statute limiting tort liability to be rational, the court rejected the equal protection challenge. 622 F.2d at 1320-21. *See also* Johnson v. International Harvester Co., 487 F. Supp. 1176 (D.N.D. 1980).

The Tenth Circuit's decision is not unconstitutional for failure to provide a substitute for punitive damages. This Court stated in Duke Power, 438 U.S. at 88, "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." This question was not decided, however, because the Court concluded that the Price-Anderson Act provided a reasonably just substitute. Similarly, there *is* a *quid pro quo* in this case. Extensive regulation by a federal agency for the protection of the public has been established, including the formation of an agency with authority to impose heavy penalties and fines and to revoke licenses. *See* discussion pp. 21-22, *supra*.

III.

THE FINAL, NON-REVIEWABLE HOLDING BY THE TENTH CIRCUIT THAT THE DISTRICT COURT HAD NO JURISDICTION TO HEAR APPELLANT'S PERSONAL INJURY CLAIM ELIMINATES THE BASIS FOR THE PUNITIVE DAMAGE AWARD

In stating the case, the appellant has wholly ignored the plain fact that the punitive damages were awarded here based on claims of personal injury to Silkwood. The court of appeals' non-reviewable[45] ruling that the personal injury claim is precluded by the Workers' Compensation Law nullifies the $10,000,000 punitive damage award since that award was incident to the personal injury claim. This is true without regard to federal preemption.

The appellant has attempted to invoke this Court's mandatory appellate jurisdiction under 28 U.S.C. § 1254(2), which restricts review to the federal questions presented. Accordingly, the appellant's Jurisdictional Statement is confined to challenging the Tenth Circuit's reversal of the award for punitive damages on federal preemption grounds; it does not and cannot seek review of the Tenth Circuit's holding that the trial court lacked jurisdiction over the personal injury claim because of the exclusive remedy provided by Oklahoma's Workers' Compensation Act.[46] Even were this Court to grant certiorari under

[45] This Court will not review on appeal under 28 U.S.C. § 1254(2), a lower court's interpretation of state law. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 292 (1982).

[46] The appellant intimates (Appellant's Br. 8 n.13) his intention to further challenge the applicability of the Workers' Compensation Act in the district court, and refers to his Jurisdictional Statement at page 6 n.5, where he alludes to the Tenth Circuit's remand "for further considerations consistent herewith" as justification for raising the "claim of intentional or willful injury in this case." There is no basis for any such challenge. First, neither court below left the

(Footnote continued on next page.)

28 U.S.C. § 2103, the Tenth Circuit's holding that the trial court lacked jurisdiction over Silkwood's personal injury claim would not be subject to review.[47]

Since the trial court had no jurisdiction over the personal injury claim, any award of punitive damages predicated upon that claim cannot stand.[48] The liability prescribed by the

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(Footnote continued from preceding page.)

appellant such latitude. The district court stated that there was no evidence of intentional injury by Kerr-McGee (Tr. 9984, 9989); the Tenth Circuit agreed and specifically held that because there was a lack of evidence of intentional contamination by Kerr-McGee the evidence "required the Court to grant judgment n.o.v. holding that workers' compensation was the exclusive remedy for personal injuries suffered by Silkwood" (J.S.App. 9a). Second, the appellant can make no pretense of having withheld evidence relevant to intentional contamination, since any such evidence would also have been relevant to establish Kerr-McGee's purported malice—necessary to an award of punitive damages. Finally, the applicability of the Workers' Compensation Act was vigorously asserted at every stage of this action.

[47] Only the questions set forth in the jurisdictional statement will be considered by the Court. Sup.Ct.R. 15.1(a), 34.1(a). There are limited exceptions which the Court has made, none of which is applicable here, such as the "plain error" rule usually invoked only in criminal cases. Silber v. United States, 370 U.S. 717, 718 (1962).

[48] In Oklahoma, exemplary damages cannot constitute an independent basis for a cause of action, and are recoverable only as an incident to the recovery of compensatory damages. Barnes v. McKinney, 589 P.2d 698, 700 n.1 (Okla. Ct. App. 1978). Without a claim for actual damages, a claim for punitive damages no longer exists. Davidson v. First Bank and Trust Co., 609 P.2d 1259, 1262 (Okla. 1976); Fuller v. Neundorf, 278 P.2d 836, 839 (Okla. 1954).

Oklahoma Workers' Compensation Act is "exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise, . . ."[49] and does not include any provision for punitive damages.[50] The Oklahoma Act is characteristic of workers' compensation laws throughout the country. A respected commentator on these laws has discussed the non-availability of punitive damages where workers' compensation applies. 2A Larson, *The Law of Workman's Compensation* § 65.37 (1982) states:

> Although punitive damages are of course not recoverable under a workers' compensation act, it does not follow that a suit for punitive damages escapes the exclusiveness bar. On the contrary, at any point where compensatory damages would be barred, punitive damages are also barred.

There is no deviation in reported case law from the rule as stated by Professor Larson.[51]

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[49] Okla. Stat. Ann. tit. 85, § 12 (West Supp. 1982). The cases have consistently implemented this clear directive. *E.g.*, Carroll v. Dist. Court of Cherokee County, 579 P.2d 828 (Okla. 1978). The exclusivity provision represents a "trade-off," whereby an employee "relinquishes his/her right to sue for damages sustained in job-related injuries" in exchange for the protections accorded under the Act. Weber v. Armco, Inc., 54 Okla. B.J. 1267, 1268 (Okla. 1983).

[50] Okla.Stat.Ann. tit. 85, § 12, reproduced at p. 62 of App. to Kerr-McGee's Motion to Dismiss or Affirm.

[51] Cases in which it was held that the exclusivity provisions in workers' compensation laws preclude an award of punitive damages include: North v. United States Steel Corp., 495 F.2d 810, 814 (7th Cir. 1974); Dickson v. Mountain State Mut. Cas. Co., 650 P.2d 1, 3 (N.M. 1982); Liberty Mut. Ins. Co. v. Stevenson, 368 S.W.2d 760, 762 (Tenn. 1963); and Ellis v. Rocky Mountain Empire Sports, Inc., 602 P.2d 895, 898 (Colo. Ct. App. 1979).

The Tenth Circuit has held that the exclusivity provision of the Oklahoma Workers' Compensation Act precludes recovery of compensatory and punitive damages for injuries covered by the Act, even though plaintiff alleges "the highest possible degree of negligence." Arrington v. Michigan-Wisconsin Pipeline Co., 632 F.2d 867, 871 (10th Cir. 1980).

The appellant's statement of facts (Appellant's Br. 8-14) details Silkwood's contamination and emphasizes that which is no longer involved in this case—the *personal* contamination of Karen Silkwood. Indeed, the loss of Silkwood's personal property—stipulated to be worth $5,000—is mentioned by the appellant only in passing, as it was at trial. Thus, ignoring the Tenth Circuit's holding that the trial court had no jurisdiction over the personal injury claim, the appellant continues to urge assessment of the purported culpability of Kerr-McGee in the context of the gravity of harm to Silkwood personally—not to her property.

There can be no doubt that the jury awarded punitive damages as incident to the personal injury claim. The trial court's instruction on punitive damages shows the basis of the punitive award to be personal injury (Instruction No. 19, J.S.App. 112a-113a). Further, the trial court refused to set aside the punitive damage award as excessive on the express ground that the court believed the award bore some relationship to *personal injury,* and made no mention of property damage (J.S. App. 83a-85a).

As to the property damage award, the jury was directed to return its verdict for the appellant on the basis of *liability without fault.*[52] This was acknowledged by the Tenth Circuit, which affirmed that award not on the basis of negligence or on the basis of evidence of any intentional act or omission of Kerr-McGee, but simply because the source of the plutonium which contaminated Silkwood's personal property was stipulated to be the Kerr-McGee plant and the damage which occurred was foreseeable (J.S.App. 20a-21a).

Oklahoma law requires a causal relationship as a nexus between the injury to be compensated and any punitive dam-

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[52] *See* Instruction No. 18 and No. 20 (J.S.App. 109a-111a; 113a-116a).

ages which may be awarded. In *Hobbs* v. *Watkins*, 481 P.2d 746, 747-48, 753-54 (Okla. 1971), the court, while recognizing that the amount of an award of exemplary damages is not necessarily governed by the amount awarded as compensatory damages, states the rule that "[e]xemplary damages must bear some relation *to the cause* and extent of one's injuries. . . ." *Id.* at 747-48 (emphasis added). Since the property damage award was made and sustained on the basis of liability without fault and since the plaintiff conceded it could not show how the plutonium got into Silkwood's apartment, the property damages here were not and could not be the predicate for any punitive damage award in this case. The personal injury claim—the only basis upon which the award for punitive damages could have been made—has been entirely removed by the Tenth Circuit's non-reviewable holding that the workers' compensation statute barred the personal injury claim. Thus, without any proper predicate for punitive damages the award cannot stand. On this ground alone the judgment below should be affirmed.[53]

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[53] Other grounds for the reversal of the trial court's punitive damage judgment were urged on appeal to the Tenth Circuit by Kerr-McGee, but were never considered because of the disposition below. Among these are:

(1) Kerr-McGee's substantial compliance with AEC regulations negates any finding of malice required for punitive damages;
(2) there is no evidence of malice by Kerr-McGee;
(3) the trial court erred in certain of its instructions concerning punitive damages;
(4) the misconduct of counsel and prejudicial publicity prevented a fair trial; and
(5) the punitive damage verdict was excessive.

These grounds were extensively briefed below and relied on a detailed review of the record in their analysis. In the event that the present case is not dismissed or affirmed, this cause should be remanded to that court for consideration of these other grounds.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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